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DATUK OH CHONG PENG v. KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD KAMAL MD SHAHID J
[CIVIL APPEAL NO: WA-14-1-04-2022]
B 20 FEBRUARY 2024

Abstract – *An independent non-executive director is not an employee and, therefore, the director's fees, allowances and consultancy fees that he receives should not be subject to employment tax under s. 4(b) of the Income Tax Act 1967.*

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D ***REVENUE LAW:*** *Income tax – Assessment – Notices of additional assessments raised against taxpayer – Taxpayer independent non-executive director – Whether taxpayer employee of companies – Whether director fees, allowances and consultancy fees should be subject to income tax as employment income – Whether taxpayer acted negligently and filed incorrect tax returns – Whether assessments time-barred – Whether penalty imposed on taxpayer correct – Income Tax Act 1967, ss. 2, 4(b) & 91(3)*

E ***STATUTORY INTERPRETATION:*** *Definition – 'Employee' – Income Tax Act 1967, s. 2 – Whether independent non-executive director of companies employee*

LABOUR LAW: *Employment – Employee – Independent non-executive director of companies – Whether independent non-executive director employee – Whether there was master-servant relationship – Whether received monthly salary and common* F *employees' benefits from companies – Income Tax Act 1967, ss. 2 & 4(b)*

The appellant, an individual, (i) had incorporated two management companies. After retiring from his professional practice, the appellant continued to sit on the Board of Directors ('BOD') as an independent non-executive director of several companies; (ii) sometimes sat on the BOD G of seven or eight unrelated companies at the same time, during the years of assessment ('YAs') 2002 to 2012; and (iii) from time to time, provided consultancy services to companies where he did not sit on the BOD and he received consultancy fees from these companies for his services. All the director fees, allowances and consultancy fees received from December 1997 H to date were remitted to the management companies. Consequent to an audit, the respondent had taken the stance that the director fees, allowance and consultancy fees were employment income of the appellant from all the companies where he sat as an independent, non-executive director and subjected them to income tax as employment income under s. 4(b) of the I Income Tax Act 1967 ('Act'). The respondent then raised notices of additional assessments against the appellant for the YAs 2002 to 2012. Aggrieved, the appellant filed notices of appeal to the Special Commissioners

of Income Tax ('SCIT'). The SCIT disallowed the appellant's notices of appeal. Hence, the present appeal against the decision of the SCIT. In support of the appeal, the appellant averred that he was not an employee of the company and therefore, the directors' fees, allowances and consultancy fees from companies where he sat as an independent non-executive director should not be subjected to income tax as employment income under s. 4(b) of the Act. The respondent, on the other hand, argued that: (i) the payments received by the appellant, as the director from the companies in which he sat on the BOD for the YAs 2002 to 2012, should be treated as employment income of the appellant and be subjected to tax under s. 4(b) of the Act; (ii) the appellant had acted negligently and filed incorrect tax returns for the YAs 2002 to 2009, therefore falling within the ambit of the exception in s. 91(3) of the Act; and (iii) the penalty of 45% was correctly imposed on the appellant.

Held (allowing appeal with costs):

(1) The definition of 'employee' and 'employment' was provided under s. 2 of the Act. The SCIT was of the view that the appellant fell within the category of employment where the term 'employment' was not limited to only instances where there existed a master-servant relationship. However, the SCIT had taken a broad interpretation of the words 'employee' and 'employment' to include a person who was appointed as an independent director of a company. In doing so, the SCIT (i) failed to distinguish an independent director from a director within a company; and (ii) erred in law and fact when concluding that an independent director was an employee within the meaning of the Act and for the purposes of taxation. (paras 18-20 & 40)

(2) No relationship of master-servant between the appellant and the public-listed companies had been established. The appellant was never an employee and was also never subject to the control of the companies. Therefore, the director fees received by the appellant should be taxed as business income and not employment income. Furthermore, the Bursa Malaysia Securities Berhad Practice Note 13 sets out seven requirements of an independent director that led to a clear position that an independent director could not be taken as an employee. The SCIT had erred in concluding that the definition of independent director set by Bursa Malaysia was a mere guideline and only persuasive. (paras 23-26)

(3) One of the factors to be considered in determining if a person is an employee is the employee's contribution to the Employees' Provident Fund ('EPF') and Social Security Organisation ('SOCSO'). However, there was no evidence showing that the appellant had received the common employees' benefits such as EPF or SOCSO from the

companies in which he sat as an independent director. The fact that the appellant received remuneration for the services he provided did not mean that he was an employee of all the companies in which he sat as an independent director. Evidence revealed that the appellant, as an independent director, did not receive his director fees monthly as the fees would only be paid upon approval during the annual general meeting of a company and the approved fees would be segregated among the Board of independent non-executive directors. An employee's salary, on the other hand, is usually paid on a daily, weekly or monthly basis. (paras 33-36, 41 & 47)

(4) Pursuant to s. 91(1) of the Act, the respondent was only allowed to raise additional assessments within five years after the relevant YAs unless one of the exceptions in s. 91(3) of the Act existed, namely whether there was any fraud or the taxpayer had been negligent. The SCIT, while acknowledging that the respondent had raised assessments outside the prescribed limit for the YAs 2002 to 2009, was of the view that the respondent had successfully established negligence on the part of the appellant. There was an error made by the respondent's finding that the appellant was negligent. The SCIT failed to consider that the respondent failed to produce any proof of negligence on the part of the appellant and did not provide any reason to justify the basis for raising the time-barred assessments. (paras 70, 71 & 74)

(5) It was not disputed that the respondent had discretionary powers to impose a penalty against the appellant under s. 113(2) of the Act after taking into consideration all the relevant facts and circumstances of the case. However, the respondent failed to exercise its direction on the imposition of a penalty and did not provide reasons for the penalty. The appellant, on the other hand, had acted in good faith at all times as he had sought professional advice from a tax agent, was cooperative during the audit period and had submitted his tax returns within the stipulated filing deadline throughout the years and the matter in dispute arose from a technical adjustment. The imposition of penalty was wrong in law as there was no breach by the appellant. (paras 82-85)

Case(s) referred to:

A & Anor v. C & Anor [2015] SASC 35 ***(refd)***

Ace Insurance Ltd v. Trifunovski [2014] 2 ILJ 399 ***(refd)***

Delta-Pelita Sebakong Sdn Bhd v. Wong Hou Lianq & Ors And Other Appeals [2020] CLJU 475; [2020] 1 LNS 475 CA ***(refd)***

Director-General Of Inland Revenue v. Khoo Ewe Aik Realty Sdn Bhd [1990] 2 CLJ 160; [1990] 1 CLJ (Rep) 91 SC ***(refd)***

Ever-Yield Sdn Bhd v. Yap Keat Choon & Other Appeals [2023] 1 CLJ 345 CA ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal [2020] 7 CLJ 271 FC ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan & Anor [1996] 4 CLJ 687 FC ***(refd)***
Kenny Heights Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2015] 5 CLJ 923 CA ***(refd)***
Lim Chao Liang & Lim Chao Li v. Ketua Pengarah Hasil Dalam Negeri (Rayuan No PKCP(P) 90/2012) (Unreported) ***(refd)***
Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 540 SC ***(refd)***
Sime Darby Bhd & Ors v. Dato' Seri Ahmad Zubair Hj Murshid & Ors (Tun Musa Hitam & Ors, Third Parties) [2012] 9 MLJ 464 ***(refd)***
Tan Ban Uu & Anor v. Ong Ghin Leong [2017] CLJU 198; [2017] 1 LNS 198 HC ***(refd)***
The Queen On The Prosecution Of JB Saunders v. The Postmaster General [1876] 1 QBD 658 ***(dist)***

Legislation referred to:
Companies Act 2016, s. 216
Employees Provident Fund Act 1991, s. 43(1)
Income Tax Act 1967, ss. 2, 4(a), (b), 91(1), (3), 113(1), (2)

For the appellant - S Saravana Kumar & Amira Mohd Rafie Ravi; M/s Rosli Dahlan Saravana Partnership
For the respondent - Abdul Aziz Harun; SRC & Elina Abdul Rashid; RC

Reported by Najib Tamby

JUDGMENT
(Encl. 1)

Ahmad Kamal Md Shahid J:

Introduction

[1] This is an appeal by Datuk Oh Chong Peng (appellant) by way of a notice of appeal dated 6 April 2022 (encl. 1) against the decision of the Special Commissioners of Income Tax (SCIT).

[2] By the deciding order dated 31 March 2022, the SCIT disallowed the appeal by way of Form Q by the appellant against the assessment raised by the respondent.

[3] The SCIT in the deciding order dated 31 March 2022 had made the following findings:

> ADALAH DIPUTUSKAN bahawa Perayu telah gagal membuktikan rayuan Perayu selaras dengan perenggan 13 Jadual 5 Akta Cukai Pendapatan 1967;
>
> DAN bahawa Perayu adalah seorang 'pekerja' bagi maksud di bawah ACP;
>
> DAN bahawa saraan yang diterima oleh Perayu sebagai Pengarah Bebas/ Independent Director daripada syarikat-syarikat di mana beliau menduduki Lembaga Pengarah bagi Tahun-Tahun Taksiran 2002 sehingga 2012 adalah pendapatan Perayu dan dikenakan cukai di bawah subseksyen 4(b) ACP;

DAN bahawa Perayu telah cuai apabila gagal melaporkan saraan yang diterima dari yuran dan elaun pengarah di syarikat-syarikat yang beliau duduki sebagai Lembaga Pengarah dan juga fi konsultansi sebagai pendapatannya di bawah subseksyen 4(b) ACP sebaliknya memindahkan saraan yang diterima kepada dua syarikat pengurusannya iaitu, OCP Holding Sdn Bhd dan Garzania Sdn Bhd dan melaporkan sebagai pendapatan syarikat pengurusan di bawah subseksyen 4(b) ACP;

DAN bahawa Responden telah berjaya melepaskan beban bukti di bawah subseksyen 91(3) ACP berkaitan taksiran di luar had masa yang dibangkitkan terhadap Perayu bagi Tahun-tahun Taksiran 2002 sehingga 2009;

DAN bahawa Responden adalah betul dalam mengenakan penalti terhadap Perayu bagi Tahun-tahun Taksiran 2002 sehingga 2012 di bawah subseksyen 113(2) ACP;

DAN DENGAN ITU rayuan Perayu ditolak dan Notis Taksiran Tambahan bagi tahun-tahun taksiran 2002 sehingga 2012 yang berkaitan rayuan ini adalah dikekalkan.

(See: pp. 50 to 52 of rekod rayuan tambahan (RRT)).

[4] The appellant, being aggrieved with the decision of the SCIT, filed an appeal and is now before this Honourable Court for the court's opinion on whether the decision by the SCIT was correct based on the facts and law.

[5] After the hearing, I allowed the appellant's appeal in encl. 1. I now give my reasons for doing so.

Background Facts

[6] The narration of the background facts herein is adopted with and/or without modification from the established facts found by the SCIT and can be summarised as follows:

(i) the appellant is an individual with a residential address at 5, Laman Setiakasih Lapan, Off Jalan Setiakasih Lapan, Bukit Damansara 50490 Kuala Lumpur, Malaysia.

(ii) two management companies were incorporated by the appellant, namely OCP Holding Sdn Bhd (Company No. 131139-T) and Garzania Sdn Bhd (Company No. 100795-T) (the management companies). Both the management companies have an office address at Suit 705, Block A, Kelana Business Centre, 97, Jalan SS7/2, 47301 Petaling Jaya, Malaysia.

(iii) after the appellant retired from his professional practice, the appellant continued to sit on the Board of Directors as an independent non-executive director of several public companies. He received director's fees and allowances from these companies. These companies, among others, include IJM Corporation Berhad, IJM Plantations Berhad and Dialog Group Berhad. During the years of assessment (YAs) 2002 to

2012, the appellant, sometimes, sat on the Board of Directors of seven or eight unrelated companies at the same time. The appellant also, from time to time, provided consultancy services to companies where he does not sit on the Board of Directors. He received consultancy fees from these companies for his services.

(iv) all the director fees, allowances and consultancy fees received from December 1997 to date were remitted to the management companies. These were treated as the income of the management companies and were subjected to income tax under s. 4(a) of the Income Tax Act 1967 (ITA).

(v) the management companies then pay a monthly salary to the appellant, which he further subjects to income tax in his personal capacity as business income under s. 4(a) of the ITA. This has been adopted consistently by the appellant since 1998 and it has been accepted by the respondent until 2015.

(vi) consequent to an audit, the respondent had taken the stance that the director fees, allowance and consultancy fees were employment income of the appellant from all the companies where he sat as an independent non-executive director and subjected them to income tax as employment income under s. 4(b) of the ITA.

(vii) the respondent raised notices of additional assessments against the appellant for the YAs 2002 to 2012 as follows:

Year of Assessment	Date of Additional Assessment	Additional Tax Payable (RM)
2002	11 January 2016	15,428.00
2003	11 January 2016	63,335.99
2004	11 January 2016	52,069.50
2005	11 January 2016	46,248.00
2006	11 January 2016	35,322.00
2007	11 January 2016	45,032.30
2008	3 February 2016	924.00
2009	3 February 2016	567.00
2010	3 February 2016	546.00
2011	3 February 2016	546.00
2012	12 January 2016	138,355.23

(viii) on 5 February 2016, the appellant, being aggrieved by the impugned notices of additional assessment, filed notices of appeal (*ie*, Form Q) dated 5 February 2016 for YAs 2002 to 2012 as follows:

Year of Assessment	Date of Notice of Additional Assessment
JA 2002	11 January 2016
JA 2003	11 January 2016
JA 2004	11 January 2016
JA 2005	11 January 2016
JA 2006	11 January 2016
JA 2007	11 January 2016
JA 2008	3 February 2016
JA 2009	3 February 2016
JA 2010	3 February 2016
JA 2011	3 February 2016
JA 2012	12 January 2016

The Law

[7] It is trite law that a decision of SCIT can be set aside if the decision is tainted with the error or misconception of law or the decision is not supported by the evidence before the SCIT.

[8] This principle of law has been succinctly explained in the case of *Lower Perak Co-operative Housing Society Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 540; [1994] 1 MLRA 262; [1994] 2 AMR 1735; [1994] 2 MLJ 713, in the following manner:

> First of all, it would be pertinent to say that in consideration of this appeal we have kept in the forefront of our minds the much-quoted principles enunciated by Lord Radcliffe in *Edwards v. Bairstow and Harrison*, regarding *the duty of the court when hearing appeals from commissioners in tax cases.* It will be recalled that in that case what Lord Radcliffe said (at pp. 35-36) was this:
>
> > I think that the true position of the court on all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination, I do not think that inferences drawn from other

> facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. *When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous on point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene.* It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as those many of the facts are likely to be neutral in themselves, and only to take their color from the combination of circumstances in which they are found to occur.

In *Chua Lip Kong v. Director-General of Inland Revenue*, Lord Diplock when delivering the unanimous judgment of the Privy Council in a tax appeal had occasion to refer, with approval, to the observations of Lord Radcliffe aforesaid in the following terms:

> ... It is *plainly wrong in law; or else it is a conclusion of mixed fact and law that no reasonable special commissioners could have reached if they had correctly directed themselves in law.* Whichever way it is looked at, it falls within the well-known principles laid down by Viscount Radcliffe in *Edwards v. Bairstow*. *It is a conclusion or decision of the special commissioners which the High Court was entitled to the ought to have set aside.*

And, in *Lim Foo Yong Sdn Bhd v. Comptroller-General of Inland Revenue,* when delivering the unanimous judgment of the Privy Council, Lord Oliver indicated in what circumstances a court might interfere with the decision of the special commissioners. Here is what his Lordship said [at p 169]:

> The special commissioners are, of course, as the Federal court rightly observed, the judges of fact, but in finding the facts and drawing interferences of secondary fact from them, they must not misdirect themselves and they *must draw conclusions from facts having probative value. In their Lordships' judgment, the special commissioners in this case both misdirected themselves by reaching conclusions inconsistent with primary facts found by them and drew inferences from matters which were of no probative value in supporting their conclusions.* (emphasis added)

[9] Further, the then Supreme Court in the case of *Director-General Of Inland Revenue v. Khoo Ewe Aik Realty Sdn Bhd* [1990] 2 CLJ 160; [1990] 1 CLJ (Rep) 91; [1990] 1 MLRA 373; [1990] 2 MLJ 415 at 419, held as follows:

> *It is hardly necessary for any lawyer to be reminded that under our Income Tax Act 1967 (paras 34, 39, 41 and 42 of Schedule 5 of the Income Tax Act 1967) one may only appeal to the High Court and then to the Supreme Court on a question of law. The decision of the Special Commissioners of Income Tax as to the facts is therefore, conclusive.* In this connection, it is interesting to note the following statement by Lord Denning on the powers of the High Court on appeal in *Griffiths v. JP Harrison (Watford) Ltd* at p 916.
>
> > Now the powers of the High Court on an appeal are very limited. *The judge cannot reverse the commissioners on their findings of fact. He can only reverse their decision if it is erroneous in point of law.* Now here the primary facts were all found by the commissioners. They were stated in the case. They cannot be disputed. What is disputed is their conclusion from them. It is now settled, as well as anything can be, that their conclusion cannot be challenged unless it was unreasonable, so unreasonable that it can be dismissed as one which could not reasonably be entertained by them. *It is not sufficient that the judge would himself have come to different conclusion.* Reasonable people on the same facts may reasonably come to different conclusions; and often do. Juries do. So, do judges. And are they not all reasonable men? *But there comes a point when a judge can say that no reasonable man could reasonably come to that conclusion. Then, but not till then, he is entitled to interfere.*
>
> *A court would not therefore disturb findings of fact by the Special Commissioners unless it considers that the only reasonable conclusion on the evidence contradicts the determination of the Special Commissioners* (see *Edwards v. Bairstow, Director-General of Inland Revenue v. LCW* at p 251 and *Kota Kinabalu Industries Sdn Bhd v. Director-General of Inland Revenue* at p 190).
>
> (emphasis added)

[10] The court also has to be remindful of the caution made by the Court of Appeal in *Kenny Heights Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2015] 5 CLJ 923; [2015] 4 MLRA 114; [2015] 4 MLJ 487; [2015] 3 AMR 205, where it had stated as follows:

> [24] We make the general observation that courts, acting in accordance with the law, are at all times bound by the legislation placing jurisdiction and authority in specialized bodies such as SCIT. *The legislation specified that the deciding order of the SCIT is final and allowed appeals to the court on question of law and not on any grievance. It underlines, within the SCIT's jurisdiction, its authority and prevents the courts being buried under an avalanche of tax appeals by parties unhappy with the determination of the KPHDN and the SCIT.*

[25] Courts must also bear in mind the SCIT's specialisation. Dealing with terms and practices of the business and the business community enable them to have special insight, understanding and appreciation of the evidence and facts, to make the findings drawn from those evidence and facts. While a finding of fact often touches upon the law, the determining factor in the finding is their special insight and appreciation of the facts. *Hence, unless it is demonstrated that SCIT had erred on a question of law, resulting in a manifest error in the deciding order, the court cannot intervene, as it would amount to interference contrary to the intent of legislation setting up and empowering the SCIT.* (see *Lower Perak Co-operative Housing Society Berhad v. Ketua Pengarah Hasil Dalam Negeri* [1994] 3 CLJ 540; [1994] 2 MLJ 713; [1994] 2 AMR 1735; [1994] 1 MLRA262). (emphasis added)

[11] The legal principles of appellate intervention in cases of a full trial involving oral evidence of witnesses are well-settled. It is trite law that an appellate court will not intervene in a trial court's actual decision unless the trial court has been shown:

(i) plainly wrong in arriving at its decision;

(ii) there is no or insufficient judicial appreciation of the evidence;

(iii) no reasonable judge, similarly circumstanced, would have decided in the manner that he did;

(iv) drawing the wrong inference of fact; and

(v) to have erred in law or in principle in arriving at a decision in the case.

See:

(i) *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1; [2004] 2 MLRA 1; [2004] 6 AMR 781;

(ii) *Delta-Pelita Sebakong Sdn Bhd v. Wong Hou Lianq & Ors And Other Appeals* [2020] CLJU 475; [2020] 1 LNS 475; [2020] 3 MLJ 415; [2020] 3 MLRA 434; [2020] MLJU 109;

(iii) *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* [2020] 7 CLJ 271; [2020] 4 MLJ 662; [2020] 5 MLRA 98; [2020] 5 AMR 645.

The Issues

[12] The issues for determination before the SCIT were as follows:

(i) whether the respondent has any basis in law and fact to treat the appellant as an employee of various public listed companies by his appointment as an independent director and imposing tax pursuant to s. 4(b) of the ITA instead of s. 4(a) of the ITA.

(ii) whether the respondent has successfully discharged the burden of proof required under s. 91(3) of the ITA in relation to the issuance of the time-barred assessment for the YAs 2002 to 2009.

(iii) whether the respondent has any legal or factual basis to impose a penalty against the appellant for YAs 2002 to 2012 under s. 113(2) of the ITA.

The Parties' Contention

[13] The appellant is contesting the respondent's stand to treat the director fees, allowances and consultancy fees received as employment income of the appellant.

[14] In brief, the appellant's position is that directors' fees, allowances and consultancy fees from the companies where the appellant sat as an independent non-executive director should not be subjected to income tax as employment income under s. 4(b) of the ITA. This is primarily because the appellant was not an employee of the company.

[15] The appellant submits that the learned SCIT had erred in its decision:

(i) failing to consider that an independent director is not an employee;

(ii) failing to consider that the appellant's directors fees *etc,* are not employment income taxable under s. 4(b) of the ITA;

(iii) failing to consider the documentary evidence and testimonies by the appellant's witness;

(iv) failing to consider the objective of the issuance of the EA forms;

(v) concluding that the respondent has successfully discharged the burden of proof under s. 91(3) of the ITA in relation to the issuance of the time-barred assessment for YAs 2002 to 2009; and

(vi) concluding that the penalty imposed under s. 113(1) of the ITA upon the appellant is correct in law.

[16] The respondent's contention may be summarised as follows:

(i) the payments received by the appellant as director from the companies in which he had sat on the Board of Directors for the YA 2002 to 2012 should be treated as employment income of the appellant and be subjected to tax under s. 4(b) of the ITA;

(ii) the appellant had acted negligently and filed incorrect tax returns for the YAs 2002 to YA 2009, therefore falling within the ambit of the exception in s. 91(3) of the ITA; and

(iii) the penalty of 45% was correctly imposed on the appellant.

The Decision Of The Court

Whether Independent Directors Are Employees

[17] During the relevant years of assessment, the appellant sat as an independent director of the following companies:

(i) Alliance Financial Group Berhad;

(ii) AmFinance Berhad;

(iii) AmBank Berhad;

(iv) AMFB Holdings Berhad;

(v) British American Tobacco (Malaysia) Berhad;

(vi) Dialog Group Berhad;

(vii) IJM Corporation Berhad;

(viii) IJM Plantations Berhad;

(ix) Kumpulan Europlus Berhad;

(x) Land & General Berhad;

(xi) Malayan Flour Mills Berhad;

(xii) Malaysian Plantations Berhad;

(xiii) Nanyang Press Holdings Berhad;

(xiv) RHB Bank Berhad;

(xv) Rohas-Euco Industries Bhd;

(xvi) Star Media Group Berhad; and

(xvii) UEM Land Berhad.

[18] The learned SCIT was of the view that the appellant fell within the category of employment whereby the term 'employment' is not limited to only instances where there exists a master-servant relationship.

(See: paras. 41 to 43 of the SCIT's grounds of decision on pp. 78 to 79 of additional record of appeal (encl. 18)).

[19] The definition of 'employee' and 'employment' is provided under s. 2 of the ITA. However, I find that the SCIT had taken a broad interpretation of the words 'employee' and 'employment' to include a person who was appointed as an independent director of a company.

[20] I find that the SCIT had failed to distinguish an independent director from a director within a company. This distinction was explained in the Court of Appeal case of *Chong Kim Sang v. Metatrade Sdn Bhd* [2004] 2 CLJ 439; [2004] 1 MLRA 241; [2004] 1 MELR 4; [2004] 3 MLJ 1, where it was held:

> [29] The relationship of employer and employee exists where a worker is employed under a contract of employment, *ie*, a contract of service. According to the *Concise Oxford Dictionary* (9th Ed), an 'employee' is 'a person employed for wages or salary'. *A person who is appointed director of*

a company does not become an employee of the company. Whether he is entitled to receive remuneration as director would depend on the articles of association and that would normally have to be determined by the company in general meeting. An employee of a company can of course be appointed director of that company. He remains an employee of the company as long as his contract of employment has not been terminated and would still be entitled to receive wages or salary. As director, he would further be entitled to any remuneration as determined by the company in general meeting if that is what is provided for and allowed by the articles of association of that company. Section 30(1) of the Companies Act 1965 provides that articles (of association) may adopt all or any of the regulations contained in Table A of the Fourth Schedule to the Companies Act. Article 70 as contained in the said Table A reads:

> The remuneration of the directors shall from time to time be determined by the company in general meeting. That remuneration shall be deemed to accrue from day to day. The directors may also be paid all travelling, hotel and other expenses properly incurred by them in attending and returning from meetings of the directors or any committee of the directors or general meetings of the company or in connection with the business of the company.
>
> [30] We did not have the benefit of sighting a copy of the articles of association of the respondent in relation to remuneration of directors and thus would not be in a position to say whether the respondent adopted such an article in its articles of association. Be that as it may, *we noted that the minutes of the respondent's board of directors meeting held on 15 March 1993 showed that the board recommended varying amounts of director's fee be paid to the respondent's directors which included the appellant, subject to the approval of the shareholders at the forthcoming annual general meeting of the respondent.* It was recommended that RM500 be paid to the appellant as director's fee for that financial year ended 31 December 1992. *Directors' fees are not wages or salaries and generally shall be determined by the company in general meeting.* (emphasis added)

[21] The second category of employment, which was referred to by the learned SCIT, refers to a contract of service by an independent contractor for which a salary or remuneration is paid in exchange.

[22] The Federal Court in the case of *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687; [1995] 2 MLRA 435; [1995] 3 MLJ 369; [1995] 1 MELR 1; [1996] 3 AMR 3693 laid down the test when deciding if a contract of service exists. The Federal Court held that the "degree of control", even though it may not be a sole criterion, still plays an important role when deciding if a contract is one of service or for services. For instance, the RW verified that as an employee, he was given an employment circular, which refrained him from having the freedom of choosing his work attire, hairstyle and shoes, which on the other hand, the RW did not find such circular given to the appellant. (See: Notes of proceedings (encl. 42) on pp. 30 to 34).

[23] Therefore, I find that there was no relationship of master and servant between the appellant and the public-listed companies has been established in the instant case.

[24] I find that the appellant was never an employee and was also never subject to the control of the companies. Thus, the director's fees received by the appellant should be taxed as business income and not employment income.

[25] Further, I find that the Bursa Malaysia Securities Berhad Practice Note 13 sets out seven requirements of an independent director that led to a clear position that an independent director cannot be taken as an employee. Paragraph 1.01 of the Listing Requirement defines an "independent director":

> "independent director" means a director who is independent of management and free from any business or other relationship which could interfere with the exercise of independent judgement or the ability to act in the best interests of an applicant or a listed issuer.

[26] However, the SCIT at para. 57 of the SCIT's grounds of decision had erred in concluding that the definition of an independent director set by Bursa Malaysia was a mere guideline and only persuasive.

[27] According to the Bursa's Participating Organisations' Directives and Guidance, the Directives and Guidance that impose an obligation on a participating organisation or registered person are binding on the participating organisation or registered person. The positions for all listed companies are the same whereby an individual who is an independent director is not an employee.

[28] In coming to its decision, I find that the SCIT failed to take into consideration various case laws on the same issue, which had been decided in favour of the taxpayer.

[29] In the case of *Lim Chao Liang & Lim Chao Li v. Ketua Pengarah Hasil Dalam Negeri* (Rayuan No PKCP(P) 90/2012), the learned SCIT had decided in favour of the taxpayer. The subsequent appeal by the respondent to the High Court was also eventually withdrawn. In this case, the SCIT clearly held that a director is not an employee, which the respondent had ignored that this decision shall be a binding decision against the respondent.

[30] It is to be noted that the absence of a master-servant relationship is one of many factors raised by the appellant as to the reason why the appellant is not an employee.

[31] In *Lim Chao Liang & Lim Chao Li* (*supra*), the SCIT held that there was no element supporting that there was a master-servant relationship and considered the following factors:

(i) there was no contract of employment;

(ii) there were no offers of employment to carry out responsibilities and duties as a director;

(iii) there were no EPF and PERKESO accounts opened;

(iv) there were no pension benefits;

(v) there was no ID card as an indication of an employee;

(vi) there was no requirement of wearing a uniform;

(vii) the director had the liberty and discretion to decide the amount and regularity of time to devote in exercising his duties as a director;

(viii) there was no fixed office;

(ix) there was no entitlement to any recourse in the Industrial Court under the Employment Act 1955 or Industrial Relations Act 1967 if removed as a director;

(x) the general resolutions used by the respondent cannot be deemed as guidelines and cannot be used to determine if a person is an employee; and

(xi) at all material times, there is no master and servant relationship subsisting between the companies and the appellant.

[32] In the present case, the facts are the same as *Lim Chao Liang & Lim Chao Li* (*supra*), whereby the RW testified during the cross-examination that he had not seen any offer of employment, increment letter, circular on employment, and employee handbook, given from the companies to the appellant. It is clear that the appellant in this case does not fall within either of the categories of an "employee" under the ITA.

[33] One of the factors to be considered in determining if a person is an employee is the employees' contribution to the Employee Provident Fund (EPF) and PERKESO. Section 43(1) of the Employees' Provident Fund Act 1991 (EPF Act 1991) made it clear that the employers cannot be exempted from contributing EPF and PERKESO to their employees:

> ... every employee and every employer of a person who is an employee within the meaning of this Act shall be liable to pay monthly contributions on the amount of wages of the month

[34] It is interesting to note that RW during the cross-examination conceded that they obtained no evidence showing that the appellant had received the common employees' benefit such as EPF or PERKESO from the companies in which the appellant sat as an independent director. On the other hand, evidence produced by the appellant shows that the appellant received employees' benefit from the two management companies.

[35] Further, evidence shows that the appellant, as an independent director, does not receive his director's fees monthly. His fees will only be paid upon approval during the annual general meeting of a company and the approved fees will be segregated among the Board of independent non-executive directors.

(See: vol. 2G of the record of appeal (encl. 12) on pp. 104 to 259 for various extracts of the listed companies' annual report and EGM minutes).

[36] On the other hand, an employee's salary is usually paid on a daily, weekly or monthly basis. Most importantly, the salary of an employee will be known prior to the employment, and in the event that an employee is not paid after providing their service, the employee could seek a remedy through the Industrial Court.

[37] Furthermore, in *Sime Darby Bhd & Ors v. Dato' Seri Ahmad Zubair Hj Murshid & Ors (Tun Musa Hitam & Ors, Third Parties)* [2012] 2 MLRH 466; [2012] 9 MLJ 464, Lee Swee Seng JC (now JCA) held that a non-executive director is not an employee when he said as follows:

> [68] *One cannot deny that the duties of non-executive directors are different from that of executive directors.* What is expected of and exacted from them as non-executive directors are different from that of executive directors. Whilst they all owe a common duty to the company to act in good faith in the best interest of the company at all times (Section 132(1) of the Companies Act 1965), yet with respect to the execution of the matters that the Board and Committee members have discussed, deliberated and decided, it is the executive directors that would execute the decisions made. In other words, the executive directors will have to descend to the base and execute the decisions, solve problems, manage resources, monitor progress, measure performance and be answerable to the Board and Committee for the performance of the company as a whole. The executive directors being fulltime employees of the company as most of them generally are, would be the hands-on people involved in the daily grind of negotiation, supervision and operations. The executive directors would be answerable to the Board and Committee as a whole for the quarterly performance of the company as the non-executive directors meet with the executive directors in the full board meetings to review quarterly results before these are released to investors through Bursa Malaysia. Little wonder that the full board is required to meet at least four times in a year. *The duties of the non-executive director vis-à-vis the company are performed on an intermittent basis as he meets with the other non-executive directors and executive directors at the quarterly meeting of the Board or more often as may be necessary. Whilst they receive director's fees for being non-executive directors, they do not draw a salary unlike executive directors who are expected to work in a normal 9-5 job.*
>
> [69] *Non-executive directors are not full-time employee of the company and they may not be trained or experienced in the particular business of the company. They are allowed to be directors of other companies whether listed or non-listed subject to the number set by the bursa securities listing requirement. It stands to reason and indeed*

the reality of the matter is that vis-à-vis the company, the non-executive directors' duties cannot be as co-extensive as that of executive directors. Both common sense and commercial structures draw a distinction that modern business cannot ignore.
(emphasis added)

[38] It is clear from the above case laws that an independent non-executive director is not an employee. This is evident from the fact that there is no master-servant relationship between the appellant and the various listed companies on whose Board he sat as an independent director.

[39] The appellant's director fees, allowances and consultancy fees received should not have been subject to employment tax under s. 4(b) of the ITA as a non-executive independent director.

[40] Therefore, I am of the view that the SCIT erred in law and fact when concluding that an independent director is an employee within the meaning of the ITA and for the purposes of taxation.

Director's Remuneration

[41] It is this court's view that the fact that the appellant received remuneration for the services he provided, does not mean he is an employee of all the companies in which he sat as an independent director.

[42] On this issue, the SCIT relied on the following case and extract in arriving at the conclusion:

> [52] Panel bersetuju di dalam *The Queen on the Prosecution of J.B. Saunders v. The Postmaster General* (1876) 1 QBD 658 Per Blackburn
>
> ... The word "remuneration" is a wider term and means a *quid pro quo*. If a man gives his services, whatever consideration he gets for giving his services seem to me a remuneration for them. Consequently, I think if a person was in the receipt of a payment which would not be actual money payment, the amount he would receive annually in respect of this would be "remuneration".

(See: the additional record of appeal (encl. 18) on p. 86 (para. 52 of the SCIT's grounds of decision)).

[43] However, I find that the SCIT had failed to consider that the abovementioned case pertains to the word 'emolument' and has nothing to do with directors' fee or a similar type of payout. The case does not address the issue in our present case.

[44] Rather than referring to *The Queen On The Prosecution Of JB Saunders* (*supra*), the SCIT should have referred to the Court of Appeal case of *Ever-Yield Sdn Bhd v. Yap Keat Choon & Other Appeals* [2023] 1 CLJ 345; [2023] 2 MLJ 90; [2022] MLRAU 189, which directly deals with the issue at hand, where it was held:

Director's remuneration

[36] In *Wong See Yaw & Anor v. Bright Packaging Industry Bhd* [2016] MLRHU 296; [2016] MLJU 1911; [2016] 6 CLJ 465, the High Court usefully in the following passages summarised the law on directors remuneration, which we would readily subscribe to:

> **Law On Directors' Remuneration**
>
> [27] ... Directors of a company have no authority to expend on the funds of the company to pay themselves or any one of their number, unless they are authorised for such purpose by the company's constitution in its M & A or the payment is approved by the members of the company (see *In Re George Newman And Co* [1895] 1 Ch 674). Bowen LJ in *Hutton v. West Cork Railway Co* [1883] 23 Ch 654 stated as follows:
>
> *A director is not a servant [ie, employee]. He is a person who is doing business for the company, but not upon ordinary terms. It is not implied from the mere fact that he is a director that he is to have right to be paid for it.* In some companies ... there is a special provision for the way in which the directors should be paid; in others there is not. If there is a special provision for the way in which they are to be paid, you must look to the special provision to see how to deal with it. But if there is no special provision their payment is in the nature of a gratuity.
>
> [28] *A director of a company therefore does not have a right to be remunerated as of right by virtue of his office except as provided by its constitution or approved by its shareholders.* In *Re Richmond Gate Property Co Ltd* [1964] 3 All ER 936, it was held that in the absence of any resolution concerning the amount of directors' remuneration passed pursuant to the articles in general meeting prior to the liquidation of the company, the directors were thus not entitled to any remuneration. In *Guinness PLC v Saunders* [1990] 2 AC 663, the articles provided that the remuneration of the director performing services for the company outside the scope of the ordinary duties of a director was to be determined by the company's Board as a whole ...
>
> [29] *Neither is the fact that a person is a director of a company in itself makes that person an employee, which would otherwise entitle him to remuneration as an employee.* (emphasis added)

[45] The case of *Ever-Yield Sdn Bhd* (*supra*) clearly shows that a director is not an employee. Directors' fees are only to be approved during the annual general meeting, which was clearly demonstrated in the present case by virtue of various AGM reports. (See: vol. 2G of the record of appeal (encl. 12) on pp. 104 to 259).

[46] Thus, there are possibilities of occasions where the appellant would not even be remunerated – but this does not make the appellant any less of an independent director than he already is. As provided in the appellant's

testimony, the appellant does not get paid monthly but only upon the approval during the annual general meeting. (See: the notes of proceeding (encl. 42) on p. 90).

[47] On the other hand, the employee's salary is usually paid on a daily, weekly, or monthly basis and the amount will be known to the employee prior to the commencement of the employment. If the employee is not remunerated, an action can be pursued in the Industrial Court meanwhile the appellant does not have such rights.

[48] Based on the above, it is clear that the learned SCIT had erred in her understanding of the role, responsibilities and liabilities of an independent director such as the appellant and had misconstrued the tax treatment of the directors' fee received by the appellant.

Letters Issued By The Company Secretary

[49] The company secretary of the companies in which the appellant sat as an independent director has produced various letters issued by the company secretary to show that the appellant was appointed as an independent director and is not an employee of the company. These letters further stated that the appellant was engaged for advice and services in exchange for a fee as approved by the shareholders at the AGM of the company.

[50] However, I find that the learned SCIT had disregarded these letters issued by the company secretary and held as follows:

> [49] Surat-surat yang dikeluarkan dan ditandatangani oleh setiausaha syarikat-syarikat tersebut memaklumkan bahawa Perayu bukan pekerja/ employee mereka. Perayu mengatakan Responden melalui SR1 enggan menerima semua surat-surat tersebut kerana ia ditandatangani oleh setiausaha syarikat dan bukannya pengarah syarikat. Di dalam hal ini Penal menerima pengataan Responden dan berpandangan pelantikan Perayu tidak dilakukan oleh setiausaha syarikat, maka pengesahan tersebut perlu dilakukan oleh mereka yang diberi kuasa untuk melantik.

(See: the additional record of appeal (encl. 18) on p. 81, para. 49 of the SCIT's grounds of decision).

[51] Given the above, this court finds that the learned SCIT and the respondent had failed to understand the position and status of a company secretary and failed to appreciate the role and functions of a company secretary under the Companies Act 1965.

[52] This has been reflected in the evidence given by RW during the cross-examination when RW confirmed that if the letters were signed by the company's management as director instead of the company secretary, RW would then accept the content of the letter. (See: the notes of proceeding (encl. 42) on pp. 48 to 51).

[53] Clearly, the evidence of RW shows that RW failed to appreciate that a company secretary is an officer of the company on which the appellant sat as an independent director. The learned SCIT's concurrence with this position is similarly erroneous.

[54] Section 216 of the Companies Act 2016 provides:

> **216 Responsibility for actions of delegate**
>
> (1) Except as is otherwise provided by this Act, the constitution or any resolution of the Board or members of the company, **the directors may delegate any power of the Board to any committee of the Board,** director, **officer,** employee, expert or any other person.
> (emphasis added)

[55] In *Tan Ban Uu & Anor v. Ong Ghin Leong* [2017] CLJU 198; [2017] 1 LNS 198; [2017] 1 MLRHU 115; [2017] 3 AMR 287; [2017] MLJU 244, Collin Lawrence Sequerah J (now JCA) held as follows:

> [46] *The company secretary has been described as one who ensures compliance with the regulations affecting the company. He keeps the necessary registers, sends out notices, organises meetings, takes down minutes and files whatever forms required by law.* His duties are not fixed by law but are assigned to him by the articles of association or his contract of employment. *He follows the instructions of the board of directors of the company.* His relationship with the company has also been described as contractual in nature. See *Company law* by Walter Woon Second edition at page 219.
>
> [47] It is *therefore clear that his duties are primarily to the board of directors.*
> (emphasis added)

[56] Based on the above, I am of the considered opinion that the letters issued and signed by the company secretary should be treated as issued and signed by the Board of Directors. Therefore, the RW and the SCIT should not have disregarded the letters.

Issuance Of EA Form

[57] In raising the notices of assessment against the appellant, the respondent had solely relied on the EA forms received by the appellant from the public listed companies and concluded that the appellant is an employee.

[58] I am of the view that the SCIT had erred in concluding that the EA form is a *prima facie* evidence that the appellant is an employee. I view that the form is merely an administrative form prepared by the IRB to obtain necessary information on taxpayers. The form certainly does not supersede the laws enacted by Parliament. This has been stated by RW in his evidence.

[59] The following are *verbatim* statements made by RW:

> SKS: Line kedua, item 1, fee termasuk fee pangarah, commission atau bonus. Dan dalam kurungan bonus bagi tempoh dash. Taxpayer mengisi sana, director's fee, betul?

NBI: Betul.

SKS: LHDN dalam format dia telah pun mengatakan fee itu termasuk fee pengarah, betul? Format LHDN.

NBI: Ya, betul.

(See: p. 46 of the notes of proceeding (encl. 42) (p. 24 of 16 November 2021)).

[60] It was confirmed by the RW during the cross-examination that all the EA forms issued by the public-listed companies to the appellant for his service as an independent non-executive director are of the same format that was prepared by the respondent and the standard format includes director's fees. (See: p. 48 of the notes of proceeding (encl. 42) (p. 26 of 16 November 2021)).

[61] The RW had also conceded that it is mandatory for the companies to issue an EA form when RW said as follows:

SKS: LHDN dalam format dia telah pun mengatakan fee itu termasuk fee pengarah, betul? Format LHDN.

NBI: Ya, betul.

SKS: Encik Nashrol, form ini dikeluarkan oleh IJM Plantations Berhad, betul? Di hujung page.

NBI: Betul.

SKS: IJM Plantations Berhad bagi TT 2007?

NBI: Betul.

SKS: Kepada Datuk Oh Chong Peng, betul?

NBI: Ya.

SKS: Dan adalah wajib untuk IJM Plantations Berhad untuk mengeluarkan Borang ini, betul?

NBI: Betul.

SKS: Dan dalam borang ini pihak LHDN pun telah mengatakan bahawa gaji termasuk fee, sorry, fee termasuk fee pengarah harus dicatitkan, betul?

NBI: Betul.

SKS: Dan diberikan kepada penerimanya.

NBI: Betul.

SKS: Dan jika IJM Plantations Berhad tidak mengeluarkan Borang EA ini, itu menjadi satu kesalahan.

NBI: Betul.

(See: pp. 46 to 47 of the notes of proceedings in encl. 42 (pp. 24 to 25 of 16 November 2021)).

[62] From the evidence produced before this court, I find the EA form is a standard format prepared by the respondent which includes the director's fee, and this was agreed by the RW. It does not in any way become the determining factor in deciding the appellant's status and role in the company and does not determine the appellant's chargeability to tax (either under ss. 4(a) or 4(b) of the ITA).

[63] In fact, it is the companies that issue the EA forms, and this is not within the appellant's control. Clearly, the appellant by receiving an EA form does not necessarily or automatically mean that he is an employee.

[64] Therefore, the respondent had erred to conclude that the appellant is an employee merely because the appellant had received EA forms from the various listed companies where he sat as an independent director.

Commonwealth Jurisdiction

[65] I find that case laws from other Commonwealth countries also take the position that an independent director is not an employee.

[66] The Indian Income Tax Appellate Tribunal, in the case of *Kalyani Forge Ltd Pune v. Assessee* on 27 May 2015 expressly stated that the non-executive directors were not employees of the company.

[67] In *A & Anor v. C & Anor* [2015] SASC 35, the Supreme Court of South Australia stated that a non-executive director is not an employee on the basis that the rights and duties of an independent director arise under the general law. Hence, despite a non-executive does receive remuneration, he is still not considered as an employee of the company.

[68] In *Ace Insurance Ltd v. Trifunovski* [2014] 2 ILJ 399, the Federal Court of Australia held that the respondent was not employed by the appellant even despite the existence of a contract. The court looked into the substance of the contract *in lieu* of a single or unifying test in determining the existence of an employment relationship.

[69] Therefore, based on the above, the SCIT should have looked into the substance of the appellant's job scope and responsibilities as an independent non-executive director. Had the SCIT done so, the SCIT would have noted the difference and concluded that the appellant is not an employee.

Time-Barred Assessments

[70] Pursuant to s. 91(1) of the ITA, the respondent is only allowed to raise additional assessments within five years after the relevant year of assessment unless one of the exceptions in s. 91(3) of the ITA exists, namely, whether there is any fraud or the taxpayer has been negligent.

[71] The learned SCIT acknowledges that it is undisputed that the respondent had raised assessments outside the prescribed limit for the YAs from 2002 to 2009. However, the learned SCIT took the view that the respondent had successfully established negligence on the part of the appellant.

[72] Based on the facts established by the SCIT, I am of the view that there is an error made by the SCIT's finding that the appellant was negligent. This is because the respondent has failed to discharge the burden of proof in proving that the appellant was negligent.

[73] The respondent claimed that the appellant had negligently declared the director's fees and allowances received by him from the public-listed companies in which he had sat on the Board of Directors as management companies' income.

[74] However, I find that the appellant as an independent non-executive director is not an employee and the income received by him cannot be treated as employment income. Thus, there is no negligence found in the appellant's declaration of income.

[75] More importantly, I find that the respondent had failed to prove negligence against the appellant as the appellant had done diligently what the law expects of a reasonable person in his position whereby:

(i) the appellant took professional advice from a professional and independent tax firm;

(ii) the appellant had provided full cooperation during the audit;

(iii) the appellant made full and frank disclosure of its tax treatment in relation to his two management companies;

(iv) the appellant filed its tax returns within the prescribed statutory time frame; and

(v) there was no attempt by the appellant to evade or avoid tax.

[76] The facts of the instant case are similar with the Court of Appeal case of *Infra Quest Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2016] MSTC 30-133, where the respondent had failed to prove negligence against the appellant as the appellant had done diligently what the law expects of a reasonable person:

(i) the appellant took professional advice from a professional and independent tax firm;

(ii) the appellant had provided full cooperation during the audit;

(iii) the appellant made full and frank disclosure of its tax treatment in relation to his two management companies;

(iv) the appellant filed its tax returns within the prescribed statutory time frame; and

(v) there was no attempt by the appellant to evade or avoid tax.

[77] Based on the above, I am of the considered view that the SCIT had failed to consider that the respondent had failed to produce any proof of negligence on the part of the appellant and did not provide any reason to justify the basis for raising the time-barred assessments.

[78] I find that the only reason given by the respondent was that time-barred assessments were raised because the appellant should have been subjected to the tax under s. 4(b) of the ITA.

[79] This court is of the considered view that mere disagreements in the reading of the taxing statute does not indicate fraud, wilful default or negligence.

[80] The appellant in the instant case had taken reasonable steps to file and pay taxes in compliance with the law. This can be seen from each of the appellant's tax returns, where all were filed within the stipulated time frame. This was also acknowledged by the RW.

[81] The appellant did in fact report the receipt of the income, *albeit* under a different provision in the ITA. How could it be said that the appellant was negligent when the appellant did not fail to make the necessary declaration? The only issue in question is whether the correct provision is ss. 4(a) or 4(b) of the ITA. This is a question of interpretation of the law and does not indicate negligence.

Penalty

[82] It is not disputed that the respondent has discretionary power to impose a penalty against the appellant under sub-s. 113(2) of the ITA, which reads as follows:

> **Incorrect returns**
>
> (1) Any person who:
>
> (a) Makes an incorrect return by omitting or understanding any income of which he is required by this Act to make a return on behalf of himself or another person; or
>
> (b) Gives any incorrect information in relation to any matter affecting his own chargeability to tax of any other person,
>
> shall, unless he satisfies the court that the incorrect return or incorrect information was made or given in good faith, be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit and not more than ten thousand ringgit and shall pay a special penalty of double the amount of tax which has been undercharged in

consequences of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct.

(2) Where a person,

(a) Makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) Gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,

Then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, *the Director General may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequences of the incorrect return or incorrect information or which would have been undercharged if the return or information has been accepted as correct;* and, if that person pays that penalty (or, where the penalty is abated or remitted under subsection 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1). (emphasis added)

[83] Based on the above, it is clear that it is the discretion of the Director General of the respondent to impose penalties under sub-s. 113(2) of the ITA after taking into consideration all the relevant facts and circumstances of the case.

[84] However, after taking into consideration all the relevant facts and circumstances of the case, I view that the respondent had failed to exercise its discretion on the imposition of a penalty and did not provide reasons for the penalty. On the other hand, I find that the appellant had acted in good faith at all times, sought professional advice from a tax agent, was cooperative during the audit period and submitted his tax returns within the stipulated filing deadline throughout the years and the matter in dispute arose from a technical adjustment.

[85] Looking at the totality of the facts in this case, I am of the view that even if there was an incorrect return or information submitted by the appellant, it was done in good faith. Hence, I am of the view that the imposition of penalty is wrong in law as there was no breach by the appellant.

Conclusion

[86] Based on the reasons given above, this court is of the considered view that:

(i) an independent non-executive director is not an employee, therefore, the director fees, allowances and consultancy fees should not be subject to tax under s. 4(b) of the ITA as employment tax;

(ii) the respondent has not successfully proven negligence on the part of the appellant, therefore, the burden of proof under s. 91(3) of the ITA in relation to time-barred assessments has not been discharged; and

(iii) the respondent has no legal or factual basis to impose a penalty against the appellant for the YAs 2002 to 2012 under s. 113(2) of the ITA.

[87] The learned SCIT had failed to scrutinise the evidence presented before it and had misapplied the law and facts that merit the interference by this court.

[88] As such, I allow the appeal by the appellant (encl. 1) with costs of RM2,000 subject to the allocatur fee.